Subject Index

	Page
Petition for writ of certiorari	1
Statement of the case and of the matters involved	2
Jurisdictional statements	8
The questions presented, including reasons relied on for issuance of the writ	10
Brief in support of petition for writ of certiorari	15
Jurisdiction	15
The opinion and judgments below	16
Evidence relating to the character, use and value of the stolen articles	18
Testimony of Scott and Seelye, the confessed thieves	20
Testimony of government officers as to arrest of appellant and statements made by him	22
Witnesses for the defense	24
Specification of errors relied upon	26
Argument	27
1. It was reversible error to charge the jury that mere proof of the sale or purchase of the goods at a price disproportionate was sufficient to establish guilty knowledge on the part of petitioner	27
2. The lower court misconstrued the statute under which petitioner was convicted. Correctly construed the statute did not cover the character of goods involved	35
(a) As a matter of law the crime charged could not be committed, as the property did not fall within the definition of the statute	40
(b) The evidence was insufficient to establish that guilty knowledge on the part of appellant required by the statute	41
Conclusion	44

STATEMENT OF THE CASE AND OF THE MATTERS INVOLVED.

Petitioner and one Ben Amdursky* were jointly indicted for an alleged violation of section 87, Title 18, U.S.C.A. The charging part of the indictment reads (R. 2):

> "That Eric Adolfson and Ben Amdursky (hereinafter called 'said defendants'), did, on or about the 18th day of May, 1945, in the City and County of San Francisco, State of California, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, unlawfully, wilfully and knowingly apply to their own use property of the United States of America furnished and to be used for the armed services, to-wit: 24 Elgin wristwatches, 100 Parker 51 fountain pens, and 56 Sheaffer fountain pens, of a market value in excess of the sum of $50.00, said defendants then and there well knowing the said property was the property of the United States of America furnished and to be used for the armed services."

Section 87 of Title 18, U.S.C.A. on which the indictment was based, reads as follows:

> "Embezzling arms and stores. Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully, sell, convey, or dispose of any ordinance, arms, ammunition, clothing, subsistence, stores, money or other property furnished or to be used for the military or naval service, shall be punished as prescribed in section 35 (C) of the Criminal Code (USC, title 18, sec. 82)."

*At the conclusion of the Government's case the Court directed a verdict of not guilty as to Amdursky. (R. 127.)

The evidence produced at the trial and the prejudicially erroneous instruction of the Court are as follows:*

During the months of March to May, 1945, the Navy Department maintained a shipping and storage plant, known as the Encinal Terminal, in Alameda County, California (R. 45); that during said months a shipment of fountain pens was made to the Encinal Terminal, for further shipment overseas, from the Naval Supply Depot in San Francisco (R. 41-2), also a shipment of Elgin wrist watches was sent to Encinal Terminal from another supply depot in San Francisco. (R. 38.) The evidence showed that these pens and watches were stored in a warehouse in Encinal Terminal. **Glenn Howard Scott,** a private in the Marine Corps, was assigned to guard duty over the warehouse in which the articles were stored and stole certain fountain pens and Elgin watches which were taken off the Government property by **Jesse Seelye,** a civilian mechanic working at the Terminal. Certain of these watches and fountain pens, as testified to by Scott and Seelye, when called as Government witnesses, were sold to petitioner who operated a small cigar store on lower Market Street, in San Francisco.

Scott and Seelye were charged with the larceny of the foregoing property, had pleaded guilty thereto and, at the time of trial, were awaiting sentence, the

*A more detailed statement of the evidence appears in the brief filed in support hereof.

pronouncement of sentence having been deferred until after the trial of petitioner.

The watches were only sold to officers going overseas, privates could not purchase them (R. 40); an officer overseas who lost such watch had to purchase another (R. 41); that "as part of the ordinary movement of a man in the armed services this watch is not delivered to him by the Government as part of his personal equipment" (R. 41); any man overseas who had a requirement for a watch, for a special duty, signed a receipt for one and returned it when the requirement was completed. (R. 41.) The selling price of the watches to the Government is $13.43 each (R. 36) and this particular kind of watch was only sold to the U. S. Marine Corps (R. 36);

The fountain pens were carried in the ships stores (R. 42) where articles such as are carried in any man's merchandise shop are sold to any person in the navy (R. 44); the pens are not issued as a matter of general make-up as equipment of a member of the marines, the pens are not issued—they are sold (R. 44); that the pens are no different from the same make sold in civilian stores. (R. 44.) The retail price of the pens was as follows: Waterman $18.75, Shaeffer's Triumph $12.50, Parker Gold $15.00, Eversharp $5.00 and other Waterman pens $10.00. (R. 42-3.) The cost to the Government of the pens was as follows: Parker "51" pens $7.50. Shaeffer pens $6.25. (R. 44.) On the boxes containing the "Parker 51" pens was a navy inspector's mark, a rubber stamp of an anchor and the letters "U.S." which was put on

when the pens were inspected and accepted at the factory (R. 44); that orders placed by the Government for pens had been cancelled after the materials had been inspected and accepted. (R. 45.) Articles purchased in the ship's stores became the property of the purchaser. (R. 48.) During the time in question similar Shaeffer pens were being sold by the manufacturer to civilian distributors and dealers from 40% to 50% of the retail selling price; thus a $12.50 retail pen would be sold by the company for $7.50. (R. 51-2.)

Glenn Howard Scott, a private in the Marine Corps, one of the confessed thieves, testified that on a prior occasion he had stolen some cigarette lighters from Encinal Terminal and sold them to petitioner (R. 53); that he, with the aid of Seelye had stolen the watches and pens and, on May 17, they had sold them to petitioner at his little cigar store for a little over $1,000.00 (R. 55); that he had on his uniform as a private in the Marines (R. 55); that he was very drunk and could not remember much of the conversation (R. 56); that Seelye was dressed in civilian clothes (R. 56); he would not say one way or the other whether he told petitioner he was selling on a commission for a man in Oakland (R. 60); he did not remember of having seen another man in the store (R. 61); Adolfson never asked him if the pens or watches were stolen (R. 61); he did not recall whether Adolfson asked if the property came from the Government and that either Seelye or he answered "No, it does not". (R. 62.)

Jesse Seelye, a civilian and Scott's fellow thief, testified in substance the same as Scott. He further testified that he would not say yes or no as to Soctt having said he would get 5% commission for selling the articles (R. 78); that neither he nor Scott told Adolfson the articles were stolen (R. 78); he would not say for sure whether he heard Adolfson ask if the stuff was stolen and Scott replied to the effect that it was not. (R. 78.)

A written statement made by petitioner to Mr. Baird of the FBI was received in evidence, over petitioner's objection, and appears in the record at pages 105 to 109, and is set forth in a footnote to the lower Court's opinion. (R. 146-148.) This statement sets forth the purchase by petitioner of some "Zippo" cigarette lighters from a man in the uniform of a Marine who gave the name of Melvin Lott; that on May 17, the Marine and a civilian came to his store and sold him the pens and watches for $1124; that the Marine told him the articles were not stolen; that he resold all but four watches and a few pens to Ben Amdursky.

In Adolfson's store FBI agent Crow found a sign advertising "Zippo" lighters for sale. (R. 99.)

Although petitioner did not testify, he called four witnesses in his defense:

Carl Edel, testified that he was employed on the San Francisco Municipal Railway and was married and had a family (R. 112); that on May 18, 1945, he was in Adolfson's cigar store when petitioner pur-

chased some fountain pens from two young men, one carrying a satchel (R. 113); that petitioner asked where the pens came from and the man said "I bought them from a man across the Bay in Oakland"; that Adolfson then asked if they were stolen and the man said "NO—No, by no means", that they were working on a 5% commission (R. 113); that he took the man for a civilian (R. 113); that he saw two signs displayed in petitioner's store advertising "Zippo" lighters for sale, they were where the public could see them (R. 116, 117), about a week before the boys came to sell the fountain pens.

F. G. Grogan testified that he was a customer of Adolfson's and was in his store almost every day (R. 119); that there was a counter where cigarette lighters, wrist bands, sun glasses, etc. were displayed (R. 119); that he had seen the two signs, prominently displayed, offering "Zippo" lighters for sale. (R. 119.)

The Court gave the following instruction to the jury (R. 121; Assignment of Error No. 9, R. 25):

> "You are instructed that if you find that the defendant Eric Adolfson sought to purchase or to sell the watches or fountain pent at a price disproportionate to the value of said watches or fountain pens, this fact may be considered by you as a circumstance from which you may infer that said defendant knew the watches and fountain pens were stolen."

to which portion of the charge petitioner duly objected and excepted. (R. 128.)

After motions for a new trial and in arrest of judgment were made (R. 11) and denied (R. 9) an appeal was taken to the lower Appellate Court, urging as grounds for reversal of the judgment the following: (a) that prejudicial error occurred in the Court charging the jury as above set forth on a basic issue in the case; (b) that the evidence did not establish an offense under 18 U.S.C.A. sec. 87; and (c) that the evidence established that the watches and fountain pens were not within the class of property covered by 18 U.S.C.A. sec. 87.

The Circuit Court of Appeals affirmed the conviction and judgment. In dealing with the error in the foregoing instruction the lower Court stated:

> "Standing alone, the criticized instruction might be regarded as substantial error" (R. 144)

but held no prejudice resulted as the evidence established defendant's guilt, thus indulging in a line of reasoning condemned by this Court in *Bollenbach v. United States,* 326 U. S. 607, 90 L.ed. Ad. Op. 318.

The lower Court also decided the remaining two points adversely to petitioner, thus misconstruing a statute of the United States.

JURISDICTIONAL STATEMENTS.

1. **The jurisdiction of this Court** is invoked under section 240(a) of the Judicial Code as amended. (28 U.S.C.A. sec. 347.)

2. **The decision of the Circuit Court of Appeals** was rendered and filed on February 6, 1947. (R. 138.) A petition for rehearing was denied on March 4, 1947. (R. 154.) The judgment of the Court below was entered on February 6, 1947. (R. 153.)

3. **The basis upon which it is contended that the Supreme Court had jurisdiction** herein and the cases believed to support such jurisdiction are as follows:

(a) The trial Court's instruction to the jury, to the effect that the jury could find that defendant knew the articles were stolen solely from the disproportion between the value thereof and the price defendant bought or sold them, was an erroneous instruction and a misdirection of the jury on a basic issue, viz.: the guilty knowledge of defendant. Under such circumstances this Court has exercised its jurisdiction to correct such error in the case of *Bollenbach v. United States,* 326 U. S. 607, 90 L. ed. Ad. Op. 318. (See also concurring opinion of Mr. Justice Frankfurter in *Estep v. United States,* 327 U. S. at 145.)

(b) The decision of the Appellate Court is in conflict with applicable decisions of this Court rendered in *Bollenbach v. United States,* supra, and *Estep v. United States,* supra. Under such circumstances this Court has jurisdiction on certiorari to review the action of the lower Court. *Dept. of Treasury v. Ingram-Richardson Co.,* 313 U. S. 252, 253, 85 L. ed. 1313, 1315.

(c) Where a misconstruction or misapplication of a statute is made by the lower Court, this Court has jurisdiction on certiorari to correct such error. *United States v. Rizzo,* 297 U. S. 530, 532, 80 L. ed. 844, 847. Here, the lower Court misconstrued section 87 of Title 18, U.S.C.A., in holding that the stolen articles were within the purview of the statute; that the statute covered all goods the property of the United States and that the statute was not limited to property that remained the property of the United States and was only issued for use to the armed forces.

THE QUESTIONS PRESENTED, INCLUDING REASONS RELIED ON FOR ISSUANCE OF THE WRIT.

The questions now presented, a statement of which discloses the reasons why the writ of certiorari should issue, are as follows:

1. In a criminal prosecution for unlawfully converting to one's use property of the United States a basic issue in such trial is the question of the guilty knowledge and intent of the accused. In such circumstances is it not prejudicial error for a trial Court to charge the jury that, if they find there was a disproportion between the value of the property converted and the price at which accused sought to purchase or sell such property, such fact standing alone is sufficient to justify a finding that accused knew the property was stolen?

2. Did not the giving of the foregoing instruction under the circumstances in effect tell the jury

that the proof of such fact standing alone justified a verdict finding the defendant guilty?

3. It being admitted, as the lower Court admitted, that the giving of the foregoing instruction was substantial error (R. 144), did not the Circuit Court of Appeals commit substantial error in substituting its opinion of guilty for the "ascertainment of guilt by a jury under appropriate judicial guidance", the latter being the proper procedure as announced by this Court in *Bollenbach v. United States,* supra?

4. Do not the provisions of 18 U.S.C.A., section 87, only apply to military equipment of the United States which, when issued or distributed to the Armed Services, still remains the property of the United States, and did not the Appellate Court misconstrue such statute in holding to the contrary?

The foregoing questions are of paramount importance and call for a decision of this Court thereon.

The statute under which the prosecution was brought has never been construed by this Court. Under the construction of this statute by the lower Court this section becomes a mere repetition of the matters stated in sections 86, 100 and 101 of Title 18 U.S.C.A., a construction of the statute which renders it mere surplusage.

Furthermore, petitioner was entitled to have his guilt or innocence determined by a jury under proper judicial guidance. Here it is admitted that there was a misdirection of the jury and petitioner's conviction now stands upon ascertainment of guilt by the

appellate judges and not upon a verdict of the jury returned pursuant to the procedure and standards appropriate for criminal trials in the Federal Courts.

Wherefore, petitioner prays that this Honorable Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
March 28, 1947.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.

Certificate of Counsel

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
March 28, 1947.

Leo R. Friedman,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No.

ERIC ADOLFSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of section 240a of the Judicial Code, 28 U.S.C.A., section 347.

The grounds on which the jurisdiction of this Court are invoked and cases believed to sustain such jurisdiction are fully set forth in the petition filed herewith under the heading "Jurisdictional Statements" and may be summarized as follows:

1. The trial Court misdirected the jury by charging that guilty knowledge of petitioner could be inferred solely from the fact that he sought to purchase or sell the property involved at a price disproportionate to its value. This was a basic issue in the case. The instruction was error and subject to correction by this Court on certiorari. (*Bollenbach v. United States,* 326 U. S. 607, 90 L. ed. Ad. Op. 318.)

2. The decision of the Appellate Court is in conflict with applicable decisions of this Court such as *Bollenbach v. United States,* supra, and this Court has jurisdiction on certiorari to review such action. (*Department of Treasury v. Ingram-Richardson Co.,* 318 U. S. 352, 353, 85 L. ed. 1313, 1315.)

3. The lower Court has misconstrued the statute under which the prosecution was brought. This Court has jurisdiction on certiorari to correct such error. (*U. S. v. Rizzo,* 297 U. S. 530, 532, 81 L. ed. 844, 847.)

THE OPINION AND JUDGMENTS BELOW.

The judgment of the trial Court was entered on November 6, 1945. (R. 12.)

The decision of the Circuit Court of Appeals was rendered and filed on February 6, 1947. (R. 138.)

The judgment of the Circuit Court of Appeals was entered on February 6, 1947. (R. 153.)

The order denying a petition for rehearing was entered on March 4, 1947. (R. 154.)

The statute involved.

Section 87 of Title 18 U.S.C.A. on which the indictment was based, reads as follows:

> "Embezzling arms and stores. Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money or other property furnished or to be used for the military or naval service, shall be punished as prescribed in section 35 (C) of the Criminal Code. (USC title 18, sec. 82.)"

Under the foregoing statute an indictment was filed against petitioner and one Ben Amdursky (the latter was acquitted on direction of the Court). It alleged that they did

> "* * * unlawfully, wilfully and knowingly apply to their own use property of the United Staes of America furnished and to be used for the armed services, to-wit: 24 Elgin wrist watches, 100 Parker 51 fountain pens, and 56 Sheaffer fountain pens, of a market value in excess of the sum of $50.00, said defendants then and there well knowing the said property was the property of the United States of America furnished and to be used for the armed services." (R. 2.)

As a full knowledge of all of the evidence is necessary to properly judge the errors in the lower Court's decision, we here set forth a summary of the testimony of the witnesses in more detail than is set out in the foregoing petition.

Evidence relating to the character, use and value of the stolen articles.

W. A. Sira, a first lieutenant in the Marine Corps, testified that the watches were only sold to officers proceeding overseas; that private and non-commissioned officers could not purchase them (R. 40); that if the officer was overseas and lost such a watch he would have to buy another one. Sira further testified that **"as part of the ordinary movement of a man in the Armed Services this watch is not delivered to him by the Government as part of his personal equipment"** (R. 41); that any man overseas who has a requirement for a watch is issued one and must sign a receipt for it and return it when that requirement has been completed. In the case of officers those requiring it permanently must purchase it.

J. M. Johnston testified he was Department Manager of the Elgin Watch Company; he identified 16 of the watches in evidence as having been made by his company and sold to the United States Navy (R. 31 to 36); that the selling price to the Government was $13.43 each; that such watches were not sold to anyone except the United States Marine Corps (R. 36); that prior to the war the Elgin Watch Company made a comparable watch which was sold to civilian distributors at about the same price; that the approximate retail value is about $47.50 (R. 37); that the watch in evidence was made according to Marine Corps specifications and differed in several particulars from the watch sold to the public. (R. 37.)

C. F. Broer testified that he was connected with the Ship's Stores stock group of the Naval Supply Depot, that all type of materials for resale in Ship's Stores, such as drugs, stationery, watches, fountain pens, cigarette lighters, etc., are handled in that depot. (R. 42.) He identified the various fountain pens in evidence as being of the type furnished in the Ship's Stores. (R. 42.) He gave the prices of the various types of fountain pens as follows: Waterman $18.75 retail (R. 42); Shaeffer's Triumph $12.50 retail; Parker Gold $15 retail; Eversharp pens $5; and other Waterman pens $10 retail. (R. 43.) He testified that the "Parker 51" pens were purchased from the S & K Sales Company of San Francisco and came in the type box shown him by the prosecutor (R. 43); that on the box of the Parker 51 pens was a Navy Inspector's mark (a rubber stamp), an anchor with the letters "U.S.", that was put on at the time the pens were inspected and accepted for the Navy at the factory. (R. 44.) A Ship's Store is a store operated by the Navy where material is sold to the men just as in a merchandise shop; **that the pens are sold in Ship's Stores to any person in the Navy who wants to buy them (R. 44); that the pens are not issued as a matter of general makeup as equipment of a member of the Marines; that they are not issued, they are sold;** that they are no different from the same make of pens that are sold in civilian stores. (R. 44.) He further testified that the Parker 51 pens cost the Government $7.50, and the $12.50 Shaeffer pens cost the Government $6.25 (R. 44); that it was a fact that orders

placed by the Government have been cancelled after the materials have been inspected, accepted and the rubber stamp placed thereon. (R. 45.)

Lieutenant Commander R. W. Douglas testified that Navy personnel were allowed to purchase from the Ship's Stores in places outside the United States such articles as watches, fountain pens and cigarette lighters for their own use and not for resale (R. 48); having once purchased one of these things in Ship's Stores it became the property of the person who bought it. (R. 48.)

George Lecky, manager of the Shaeffer Pen Company, testified that during March, April and May his company was selling fountain pens to civilian distributors and to dealers and that the discount to dealers was from 40 to 50 per cent of the retail selling price of a pen. Thus, a $12.50 retail pen would be sold by the company for $7.50. (R. 51 and 52.)

Testimony of Scott and Seelye, the confessed thieves.

Glenn Howard Scott testified in part as follows: I am a private in the United States Marine Corps. (Here the witness testified as to the stealing of various articles from the warehouse at Encinal Terminal.) I brought the watches and fountain pens to San Francisco accompanied by Jesse Seelye and brought them to the small cigar store operated by Eric Adolfson and sold them there (R. 55) about May 17. I was wearing my uniform as private first class in the Marines. I sold him 24 watches and approximately 150 fountain pens for a little over $1000. (R. 55.) I told Adolfson

my name was Melvin Lott. I was paid in cash. I can't tell very much what was said by me and Adolfson because I drank very heavily that morning and was not exactly sober. (R. 56.) I asked Adolfson if he could buy the pens and watches and he said he thought he could, but he would have to see a friend of his and he left his store and went some place and came back in five or ten minutes and said he thought he could handle the biggest part of them. We came back later in the afternoon and sold him the rest. (R. 57.) I had previously been in Adolfson's store about May 17 and every time I was in his store I was wearing my uniform. (R. 57.) I do not know what portion of the $1000 paid by him was for the pens and what portion for the watches. We sold him everything for a certain amount. At first he offered me less than a thousand dollars. (R. 58.) Seelye was dressed in an ordinary civilian suit. I don't know whether Seelye or I or both of us spoke. (R. 56.) I won't say one way or the other whether I told Adolfson I was selling on commission for a person in Oakland. (R. 60.) I don't remember if I saw another gentleman in the store at the time. (R. 61.) Adolfson never asked me if I was sure the fountain pens and watches were not stolen. (R. 61.) Seelye, the civilian, carried the bag containing the articles into Adolfson's store. (R. 61.) I do not recall whether or not Adolfson asked whether the property came from the Government and that either Seelye or I replied, "No, it does not." I didn't say that conversation did or did not take place. (R. 62.)

The witness testified that on a prior occasion he sold some cigarette lighters to Adolfson that he had stolen from the terminal. (R. 53.)

Jesse Seelye testified in substance the same as Scott with the following deviations and additions:

We went to Adolfson's store twice on the day in question. (R. 73.) On our first visit Adolfson took the pens and one watch. The second time he took the watches. (R. 74.) He and Scott did some figuring and finally arrived at a lump sum for the pens and watches. I will not say yes or no as to Scott having said he would get five per cent commission for selling the articles. I do not know whether Scott told Adolfson he was selling those articles for somebody in Oakland and was selling on a commission. (R. 78.) Neither Scott nor I told Adolfson the stuff was stolen. (R. 78.) I could not say for sure whether I heard Adolfson ask if the stuff was stolen and my associate replied to the effect that it wasn't. (R. 78.)

Testimony of Government officers as to arrest of appellant and statements made by him.

R. E. Crow, a special agent of the FBI, testified that he went to the cigar store of Adolfson, accompanied by other officers (R. 83); that he told Adolfson who he was and that they were there in connection with the fountain pens and watches he had purchased from a Marine and civilian several weeks before. (R. 83.) He asked where the articles were and Adolfson said he did not have them, that he had sold them to a man

by the name of Ben who owned a store across the street (R. 83); that he and the other officers then went to the store of Ben Amdursky (R. 84) and then returned to Adolfson's store accompanied by Amdursky (R. 84); that in reply to a question by Sergeant Dyer, Adolfson said that Amdursky was the man he sold the articles to; that out of the presence of Adolfson, Amdursky said he had sold the property he obtained but could get it back, and took them to the store of a Mr. Kellogg who pointed to some boxes where they found some fountain pens. (R. 87.) At the Commissioner's hearing Amdursky turned over to Crow twenty-eight fountain pens (R. 98); Adolfson turned over to us an Elgin watch and three fountain pens. (R. 97.) In Adolfson's store he saw a sign which said "Zippo" lighters. (R. 99.)

C. J. Dougherty, of the San Francisco Police Department, testified that he was present at the Hall of Justice, in San Francisco, when a Mr. Baird took a written statement from Adolfson. (R. 103, 104.)

The Government thereupon offered the statement in evidence and it was admited over the objection of petitioner that the *corpus delicti* had not been established and that the necessary element of knowledge required by the statute had not been established. (R. 105.)

The written statement of Adolfson appears in the record, at pages 105 and 109 and is set forth in a footnote to the Appellate Court's decision. (R. 146 to 148.)

Witnesses for the defense.

Carl Edel, called as a witness by appellant, gave the following testimony with reference to the sale of the pens by Scott and Seelye to appellant:

I am a track oiler on the Municipal Railway; I am a married man with a family, and have been a resident of San Francisco for 38 years. I know the defendant, Eric Adolfson, and where his place of business is in this city. On the 18th day of May, 1945, at the time when some fountain pens were supposed to have been purchased from him, I was in his store. It was approximately 2:00 o'clock in the afternoon. I saw two young men come in. One had a satchel. The other had nothing in his hand. The one that had the satchel was a tall fellow darkly complected, about 5′ 7″. I was in about five minutes before those two men came in. One fellow had a satchel with fountain pens, and he asked Mr. Adolfson, "Do you want to buy them fountain pens," and Mr. Adolfson said, "Where did they come from?" "Well," he says, "I bought them from a man across the Bay, in Oakland," and Mr. Adolfson said, "They weren't stolen, were they?" and he said, "No—No, by no means." He said they were working on a commission, "I believe 5%." Mr. Adolfson asked the man how much they want for it. He said $9. Mr. Adolfson said, "A little too high," so I don't know how much he paid for it. He bought the fountain pens, and I left before he paid for them. The tall man mentioned that he was working on a 5% commission basis. So far as I remember, the shorter

man of the two did not have anything to say. He had no coat on or hat. He had a shirt and trousers. I took him for a civilian. (R. 112-113.)

At the time I was in the store I saw a sign like defendant's "Exhibit A"; it was in front of the store where people could see it. There were two signs and I saw them about the time I saw the cigarette lighters there for sale. (R. 116.) The signs were there about a week before the boys came in and sold him the fountain pens. (R. 117.) (The two signs were admitted in evidence and advertised the sale of cigarette lighters.)

Charles E. Braslan, called by appellant, testified: I am traveling field engineer for the Neptune Heater Company. I would say Eric Adolfson's reputation for honesty and integrity on and prior to May 18, 1945, was good. (R. 117.)

Frank Perez, called by appellant also testified that appellant's reputation for honesty and intergrity was good. (R. 118.)

F. G. Grogan, called by appellant, testified: I am a customer of Mr. Adolfson and am in his place of business nearly every day. He has a counter there that contains wrist bands, sun glasses, cigarette lighters and miscellaneous things of that kind. (R. 119.) I do not recall of seeing any fountain pens there. Several months ago I saw the two signs (Defendant's Exhibits A and B) in the store of defendant; they were displayed practically in front of the store and visible from the street. (R. 119.) (This refers to the two signs offering "Zippo Lighters" for sale.)

The Court gave to the jury the following instruction (R. 121, Assignment of Error No. 9, R. 25):

> "You are instructed that if you find that the defendant Eric Adolfson sought to purchase or to sell the watches or fountain pens at a price disproportionate to the value of said watches or fountain pens, this fact may be considered by you as a circumstance **from which you may infer that said defendant knew the watches and fountain pens were stolen.**"

to which portion of the charge petitioner objected and excepted. (R. 128.)

A motion for a new trial was made (R. 11) and denied. (R. 9.) A motion in arrest of judgment was made (R. 11) and denied.

The Circuit Court of Appeals affirmed the conviction and judgment (R. 138) and in so doing committed substantial error, all of which appears in the following "Specification of Errors Relied Upon".

SPECIFICATION OF ERRORS RELIED UPON.

1. The Circuit Court of Appeals erred in holding that no prejudicial or reversible error occurred, as the evidence established petitioner's guilt, in the giving of the complained of instruction which the lower Court conceded was erroneous and "standing alone constituted substantial error". (R. 144.)

2. The Circuit Court of Appeals erred in substituting the opinion of its judges as to the guilt of peti-

tioner in lieu of the ascertainment of petitioner's guilt by a jury under appropriate judicial guidance.

3. The Circuit Court of Appeals erred in holding that section 87 of Title 18 U.S.C.A. applied to any property of the United States which was unlawfully converted by any person and in not construing said section as applying only to military or naval equipment of the United States which, when issued or distributed to the Armed Services, remained the property of the United States.

4. The Circuit Court of Appeals erred in holding that the guilt of petitioner was established even though there was no competent evidence to prove or from which it could be inferred that petitioner knew the property was stolen or, if he had such knowledge, that it was property of the United States.

ARGUMENT.

1. IT WAS REVERSIBLE ERROR TO CHARGE THE JURY THAT MERE PROOF OF THE SALE OR PURCHASE OF THE GOODS AT A PRICE DISPROPORTIONATE WAS SUFFICIENT TO ESTABLISH GUILTY KNOWLEDGE ON THE PART OF PETITIONER.

The trial Court instructed the jury as follows:

> "You are instructed that if you find that the defendant Eric Adolfson sought to purchase or to sell the watches or fountain pens at a price disproportionate to the value of said watches or fountain pens, this fact may be considered by you as a circumstance from which you may infer

that said defendant knew the watches and fountain pens were stolen." (R. 121.)

The decision of the Appellate Court concedes that the foregoing instruction was erroneous (R. 144) but to leave no doubt on this point we cite several authorities holding that an inference of guilty knowledge cannot be drawn merely from evidence that the purchase or sale of stolen property was at a price disproportionate to its value.

The rule is correctly set forth in 53 *Corpus Juris*, page 537, section 94(3) as follows:

> "Inadequacy of Price Paid. Guilty knowledge cannot be inferred merely from the inadequacy of the price paid by accused for the property. Nevertheless, it is a material fact bearing upon the presence of guilty knowledge, and in connection with other facts in evidence * * * may be sufficient to show guilty knowledge."

In *People v. Levison*, 16 Cal. 98, the trial Court charged the jury that the purchase of goods, very much under their value by defendant, is sufficient proof of the knowledge by him that the goods were stolen. The Court says, "This is not true," and adds:

> "That the purchase of stolen goods by the defendant, at a price grossly disproportioned to their value, is a fact against him, which, in connection with other facts, might be sufficient to establish his guilt, is not denied; and that the denial of the possession of the goods, if such denial be shown to be false, is another fact against him, is also true; but neither of these

> facts, standing alone, especially if there be rebutting proof, constitutes a legal **conclusion of guilt.**" (Emphasis by the Court.)

On the next page the California Court concluded its decision with the following words:

> "In this case, the jury might well believe the Court instructed them, that if the defendant bought the goods much below their value, this was sufficient to convict him; * * *."

To the same effect are the cases of *Minor v. State,* 55 Fla. 90, 45 So. 818; *Sartorious v. State,* 24 Miss. 602; *Trail v. State* (Tex. Cr.), 57 S. W. 92; *Commonwealth v. Sendrow* (Pa.), 181 Atl. 450.

The last word on the subject is the decision of this Court in *Bollenbach v. United States,* 326 U. S. 607, 90 L. ed. Ad. Op. 318, where the defendant was convicted of conspiring to violate the National Stolen Property Act. On request of the jury for additional instructions the Court instructed the jury "that possession of stolen property in another state than that in which it was stolen shortly after the theft, raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but such presumption is subject to explanation and must be considered with all the testimony in the case". The Appellate Court, as here, held the instruction to be erroneous but refused to reverse the cause on the ground that no prejudice resulted as the evidence was sufficient to establish Bollenbach's guilt. This Court held that the instruction was both error and preju-

dicial and reversed the conviction. (Further reference to this case will hereafter be made.)

The decision of the Circuit Court of Appeals herein and its reasoning on this point is as follows:

> **"Standing alone, the criticized instruction might be regarded as substantial error.** But an examination of the entire record persuades us that the compelling force and significance of the entire body of evidence in this case justifies the conclusion that the giving of this instruction was harmless error. Appellant argues that a purchase of stolen property at a price disproportionate to its value is insufficient as a basis for an inference of guilty knowledge and that such **fact** (purchase price disproportionate to value) is only a circumstance which, taken into consideration with other circumstances proved, may justify the inference of guilty knowledge. In this case the circumstance (fact) of disproportionate price paid when measured against the value shown by the testimony, appeared to be clearly established in the evidence. When considered in the further light of the inculpatory facts freely admitted in a written confession of appellant introduced in evidence, we think the instruction was sufficiently supported and was justified by a consideration of the entire body of evidence." (R. 144.)*

It should be noted that the lower Court misconstrued petitioner's contention. Petitioner **did not contend** that the instruction found no support in the evidence as to a disproportion between the value and

*Unless otherwise noted, all emphasis appearing in quotations have been supplied by the writer.

the price at which petitioner offered to buy or sell. Petitioner **did contend** that the instruction was erroneous and prejudicial as a matter of law.

The lower Court adopted a line of reasoning condemned by this Court in the *Bollenbach* case. In the latter case this Court said:

> **"A conviction ought not to rest on an equivocal direction to the jury on a basic issue.** And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal."

(See also concurring opinion of Mr. Justice Frankfurter in *Estep v. United States,* 327 U. S. at 145.)

Here we have three experienced circuit judges holding the instruction to be erroneous. This instruction is more than equivocal. It left no room for construction by the jury but actually told the jury they could convict if they found the mere disproportion between value and price to exist.

The reasoning of the lower Court, that no prejudice resulted because the evidence was sufficient to establish guilt, is fully answered by the decision in the *Bollenbach* case where this Court states:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that **the question is not whether guilt may be spelt out of a record, but whether guilt has**

been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

In considering whether or not the error was one which affected the substantial right of Bollenbach this Court stated:

> "Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which ' do not affect the substantial rights of the parties' and must therefore be disregarded. (February 26, 1919) 40 Stat. 1181, c. 48, 28 USCA § 391, 8 FCA title 28, § 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, Administration of Criminal Law (1905) 15 Yale LJ 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. Bruno v. United States, 308 US 287, 293, 294, 84 L ed 257, 260, 261, 60 S Ct 198; Weiler v. United States, 323 US 606, 611, 89 L Ed 495, 499, 65 S Ct 548, 156 ALR 496. **From presuming too often all errors to be 'prejudicial', the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty."**

The Court closed its opinion with the words:

> "* * * it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiable engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Here we cannot guess that the jury did not attach great weight to the erroneous instruction. This instruction in effect told the jury that if they found the value and price to be disproportionate they had a right to convict the defendant. **Thus, the jury were advised that they could disregard all evidence in defendant's favor, even though in the absence of such instruction such evidence may have been sufficient to create a reasonable doubt in the minds of a jury as to appellant's guilt.**

The record establishes the prejudice to petitioner resulting from the foregoing charge to the jury. There was ample evidence in the record to justify a verdict of not guilty or, at least, to raise a reasonable doubt of petitioner's guilt. The evidence shows that several weeks prior to the date in question petitioner purchased some Zippo cigarette lighters from the Marine, that he was advised they were not stolen and that he prominently displayed signs advertising these lighters for sale, signs which could readily be seen from the street. (R. 119.) This was a circumstance the jury could resolve in favor of petitioner's innocence. The witness Edel testified that he was present when the

first transaction involving the fountain pens took place, that the men appeared to be civilians and that they stated they had bought the articles from a man across the Bay and were selling on a five per cent commission. (R. 112-113.) This is not denied by either Scott or Seelye, each of whom merely refused to affirm or deny that such statements were made. (R. 60, 78.) The written statement of petitioner likewise makes mention of these facts and is to the effect he did not know the property was stolen. When confronted by the police officer and the special agents of the FBI petitioner concealed no fact but promptly told of the acquisition of the property and the name of the person to whom he sold it. All these facts would have been sufficient to warrant the jury in refusing to return a verdict of guilty; but, under the Court's instruction, they were in effect told to disregard this evidence and to return a verdict of guilty if they merely found that petitioner sought to buy or sell the property at a price disproportionate to its value.

It should be remembered that the jury could have accepted or rejected any part of the testimony of the thieves Scott and Seelye and the jury could have placed such construction as they saw fit on the signed statement of appellant.

The record being in such condition, any utterance by the Court which told the jury that mere proof of the one fact was sufficient on which to predicate a verdict of guilty could not have been other than highly prejudicial.

2. THE LOWER COURT MISCONSTRUED THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED. CORRECTLY CONSTRUED THE STATUTE DID NOT COVER THE CHARACTER OF GOODS INVOLVED.

The indictment was based on 18 USCA section 87, which reads as follows:

> "**Embezzling arms and stores.** Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully, sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money or other property furnished or to be used for the military or naval service, shall be punished as prescribed in section 35(C) of the Criminal Code (U.S.C. title 18, sec. 82)."*

The indictment did not accuse appellant of doing any of the things mentioned in the foregoing statute save that he did "knowingly apply to their (his) own use property of the United States of America furnished and to be used for the armed services * * * then and there well knowing that said property was the property of the United States of America furnished and to be used for the armed services". (R. 2.)

The foregoing statute is one of limited application. It does not include any of the following offenses: (i) Unlawful purchase of military or naval property; (ii) Feloniously taking and carrying away personnel property of the United States; (iii) Embezzling, stealing or purloining any money or property of the

*Section 82 prescribes a punishment by fine of not more than $10,000 or imprisonment of not more than 10 years, or both, if the value of the property exceeds $50.

United States; or (iv) Receiving, with intent to convert to his own use, any money or property of the United States knowing the same to have been stolen. Each of the foregoing four offenses are the subject matter of special statutes and each statute prescribes a different penalty for its violation. Pertinent portions of each of such statutes are as follows:

> "**Unlawful purchase or pledge of military or naval property.** Whoever shall purchase, or receive in pledge from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet or midshipman * * * having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than $500 or imprisoned not more than two years or both." (18 USCA 86.)
>
> "**Embezzling public moneys or other property.** Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than $5,000, or imprisoned not more than five years, or both." (18 USCA 100.)
>
> "**Receiving stolen public property.** Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or prop-

erty of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to be have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; * * *" (18 USCA 101.)

The embezzling or stealing of property of the United States and the receiving of stolen property knowing the same to have been stolen from the United States are crimes specifically denounced by statute and which carry punishments of only half the severity as those prescribed in the statute under which appellant was prosecuted. There must exist a reason for this distinction, and such reason is found in the language of the statute itself. This statute is limited to a specific kind of property, viz.: property of the United States "furnished or to be used for the military or naval service". In other words, the statute applies only to property that is or is to be part of the equipment of the military or naval forces and used by such forces in the performance of their duties and which is to remain the property of the United States.

The statute does not apply to property of the United States which when issued or distributed ceases to be property of the United States.

The peculiarity of the statute has been passed upon in the case of *Price v. United States* (CCA 5), 74 F. (2d) 120 (certiorari denied by the Supreme Court, 294 U. S. 720), as follows:

"Section 87 deals specially, among other things, with the larceny of arms furnished or to

> be used for the military or naval service, whereas section 100 provides punishment for the larceny of all kinds of personal property belonging to the United States. Both statutes, it is true, punish larceny, but the punishment provided in one denounces larceny of a particular kind of property specially, whereas the other relates not to the kind of property stolen, but to the offense of larceny generally. The particular is entitled to preference over the general statute. **The intention of Congress evidently was to provide for a greater punishment for stealing military or naval equipment than the general crime of larceny of property of the United States.**"

Thus, the statute denounces the converting to one's own use property of the United States which is issued as or is to be used **as equipment of the military or naval service,** and which is to remain the property of the United States.

Placing any other construction on the section would be to make it a mere repetition of the offenses denounced in sections 86, 100 and 101, supra, but increasing the penalty twofold.

The Circuit Court of Appeals did not pass upon the foregoing contention, but begged the question by stating as follows (p. 151):

> "Appellant invokes the rule of ejusdem generis and contends that what section 87 intended to prohibit was the stealing or embezzlement of ordnance, arms and ammunition, or other military equipment, and the statute cannot be applied to pens and watches here involved since they are not

enumerated therein. This on the theory that they are no part of the military equipment of the Armed Forces.

"We do not agree with this contention. We are not obliged to apply a rule of construction which would force us to write out of section 87 the phrase 'or other property'. To do so would be to hold that Congress had deliberately excluded from the ambit and protection of the statute certain important and widely-used articles and things of lesser importance than the major items enumerated. * * *"

Petitioner never contended that under the rule of *ejusdem generis* articles such as pens and watches could not be embraced within the statute. Petitioner's contention under the rule was and is in determining what articles were included within the phrase "other property", only such articles could be included which fell within the phrase "furnished or to be used for the military or naval service". Following this premise petitioner argued that the latter phrase meant property—of any kind or description—that was issued for use by the particular service and remained the property of the United States.

The Court will take judicial notice that "ordnance, arms, ammunition, clothing, subsistence, stores", etc. are issued for the use of the named services, but do not become the property of the person to whom issued, they remain the property of the United States. To violate the statute the property had to fall within such category.

The lower Court placed an erroneous construction on the statute by holding it covered any property of the United States so long as it could come into the possession of a member of the Armed Forces, irrespective of the manner of such coming, the use to be made thereof, or in whom title resided.

The evidence established that the pens and watches did not fall within the purview of section 87 and, therefore:

(a) As a matter of law the crime charged could not be committed, as the property did not fall within the definition of the statute.

The testimony as to the character of the property involved was developed from several of the Government's witnesses on cross-examination. Lieutenant Sira testified that the watches involved were sold to officers proceeding overseas (R. 40); that if an officer lost a watch he would have to buy another one. He further testified: "as part of the ordinary movement of a man in the Armed Services, **this watch is not delivered to him by the Government as part of his personal equipment**" (R. 41); that an officer requiring such a watch permanently must purchase it.

Lt. Commander Douglas testified as to articles sold in the Ship's Stores, such as watches, fountain pens and cigarette lighters; one "having once purchased one of these things in the ship's store, it became the property of the person who bought it". (R. 48.)

Lieutenant Broer testified that Ship's Stores carried various articles of merchandise, such as watches,

fountain pens and cigarette lighters (R. 42); that a Ship's Store is a store operated in which material is sold the men—just a merchandise shop (R. 44); that the fountain pens in question are sold to anyone who wants to buy them; that **"they are not issued as a matter of general makeup of the equipment of a member of the Marines; I mean they are not issued; they are sold;** they are no different from the same kind of pens that are sold in civilian stores. (R. 44.)

It is thus apparent that the fountain pens occupied no different position than such other articles carried in Ship's Stores, as drugs, toiletries, stationery, etc. (R. 42.) It is also apparent that neither the watches nor pens were issued as part of the equipment of the men in the Armed Services or remained the property of the United States. On the contrary such articles were sold as a convenience to the officers and men and became and remained the property of the purchaser.

As the goods were not of the character defined in the statute on which the indictment was based, petitioner as a matter of law could not be guilty of violating the provisions thereof.

(b) The evidence was insufficient to establish that guilty knowledge on the part of appellant required by the statute.

The statute in question (18 U.S.C.A. 87) provides that an act committed in violation thereof must consist of the following elements, each of which must be established by the prosecution to a moral certainty and beyond a reasonable doubt; **first,** that the goods

were the property of the United States; **second,** that the goods were furnised or to be used for the military or naval service; and, **third,** that appellant knew both of the foregoing facts.

The evidence in the case, a complete summary of which we have set forth above, fails to establish this guilty knowledge on the part of appellant. There is nothing in the record that discloses any set of circumstances warranting the inference that petitioner knew that the watches or pens were of the character defined by the statute, viz., goods furnished or to be used for the military or naval service, that is, that such goods were furnished or to be used as part of the equipment of the military or naval service, title remaining in the United States.

The evidence also fails to disclose any circumstances from which the inference could be properly drawn that petitioner knew the goods were stolen from the United States or that the goods were the property of the United States.

It would not be sufficient, even if the facts justify such a conclusion, which they do not, for the Government merely to prove that petitioner knew the goods were stolen. **The proof would have to go further and establish that appellant knew they were stolen from the United States.** It is only the receipt of goods stolen from the United States that can constitute a crime cognizable in the Federal Courts. The evidence discloses that the fountain pens were of no different kind or character from those of like makes sold in the ordinary civilian merchandise stores. There was

nothing about the watches that distinguished them—in the eye of a civilian—from other waterproof watches sold in civilian markets. While it is true that there was testimony that such watches were made solely for the Marine Corps and according to specifications of the Marines, the evidence also established that comparable watches were sold to civilians and that the slight difference in the rim around the watch would not be sufficient to inform any person that they were limited to sales to members of the Armed Forces.

The absence of such knowledge on the part of appellant results in a failure to prove the offense charged.

True, the witness Broer testified that on one or two of the boxes containing the fountain pens, there was a little rubber stamp of an anchor with the letters "U. S."; that such stamp was the inspector's stamp generally put on at the factory as property accepted for the Navy. (R. 44.) This witness further testified, however, that **after articles had been inspected, stamped and accepted by the Government that orders thereof had been cancelled.** (R. 45.) It is thus established that articles bearing this little rubber stamp could legally get into civilian markets for sale to civilians, after the goods had once been inspected and stamped and the orders therefor cancelled. There is no evidence that appellant ever saw this little rubber stamp which was on one or two of the boxes, and this fact cannot be presumed. See *Gargotta v. United States,* 77 Fed. (2d) 977, where the articles were marked "United States Property".

CONCLUSION.

We believe that the foregoing argument demonstrates that the decision of the Circuit Court of Appeals is erroneous for each of the reasons stated. We further believe that by charging the jury as set forth in the complained of instruction defendant was denied that fair and impartial trial guaranteed by the Constitution and under the proper procedure and standards applicable to criminal trials in the Federal Courts. Furthermore, the conviction of defendant is not being upheld on a verdict returned by a jury under proper judicial guidance, but is being affirmed because the judges of the Circuit Court of Appeals have been able to spell guilt out of the dead record. The decision of the lower Court is in direct conflict with the decisions of this Court as above set forth and the writ of certiorari should issue as prayed.

Dated, San Francisco, California,
March 28, 1947.

Respectfully submitted,
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